

ALASKA PIPELINE CO.

IBLA 77-231

Decided November 8, 1978

Appeal from a decision of the Alaska State Office, Bureau of Land Management, requiring payment for reimbursement of costs and advance rental for various amendments to right-of-way A-051647.

Affirmed in part; reversed in part.

1. Withdrawals and Reservations: Generally--Withdrawals and Reservations: Authority to Make

The inherent authority of the President to withdraw land from all forms of appropriation under the public land laws, including the mining laws, for the use of the War Department for military purposes was not limited by the Act of June 25, 1910 (the Pickett Act), which was also authority for the withdrawal, but which refers only to temporary withdrawals.

2. Rights-of-Way: Generally--Withdrawals and Reservations: Generally

10 U.S.C. § 2669 (1976) authorized the Secretary of a military department to grant an easement for a right-of-way over land permanently withdrawn or reserved for the use of that department and other land under his control. This language was all-inclusive and permitted the Secretary of the Army to issue a revocable permit for a pipeline over land withdrawn for the use of the Army regardless of whether the withdrawal be permanent or temporary.

3. Contracts: Generally—Contracts: Construction and Operation: Intent of Parties—Rights-of-Way: Generally

In the construction or interpretation of contracts, the primary purpose and guideline is the intention of the parties. A contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument. Individual words and phrases must be considered in connection with the rest of the contract. Where the Army contracts with appellant to provide natural gas to certain areas and grants appellant a rental free revocable permit to enter the "service location," for any purpose under the contract including use of the sites for installation, operation, and maintenance of the facilities, the contract can be interpreted as granting appellant a rental-free revocable permit for a right-of-way for a gas pipeline.

4. Contracts: Generally—Contracts: Construction and Operation: Actions of Parties—Rights-of-Way: Generally

In construing an ambiguous contract, the conduct of the parties in relation to such contract is to be considered in determining the meaning of the contract. Where the Army contracts with appellant to provide natural gas to certain areas and the appellant constructs a pipeline pursuant to the contract, it is reasonable to interpret the contract as providing a revocable permit for a right-of-way for such pipeline.

5. Withdrawals and Reservations: Generally—Withdrawals and Reservations: Revocation and Restoration

Under the procedures in effect prior to the passage of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 43 U.S.C. § 1701 et seq. (1977 Supp.), the revocation of a withdrawal or the restoration of withdrawn land to the public domain requires publication of a duly authorized Public Land

Order. However, relinquishment of administrative jurisdiction by an administering agency to the BLM does not, in and of itself, result in either a revocation or restoration, and acceptance by BLM of accountability and responsibility is controlled by the procedures outlined in 43 CFR Subpart 2370.

6. Withdrawals and Reservations: Generally

Where, pursuant to 43 CFR Subpart 2370, BLM has assumed administrative jurisdiction over lands formerly within the jurisdiction of another agency, the provisions of 43 CFR 2802.3-2 become applicable, and BLM acquires administrative jurisdiction over any rights-of-way then outstanding.

7. Mineral Leasing Act: Generally--Rights-of-Way: Applications

Applications for rights-of-way for oil and gas pipelines, or amendments thereto which were pending at the time of the passage of the Trans-Alaska Pipeline Authorization Act of November 16, 1973, 87 Stat. 579, amending sec. 28 of the Mineral Leasing Act, 30 U.S.C. § 185 (1976), may only be granted pursuant to the provisions of that Act.

APPEARANCES: L. G. Berry, Esq., of Robertson, Monagle, Eastaugh & Bradley, Anchorage, Alaska, for appellant; Joyce B. Wolfe, and Dan A. Hensley, Office of the Regional Solicitor, Anchorage, Alaska, for the Government.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Alaska Pipeline Company (APC) appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated February 15, 1977, requiring payment for reimbursement of costs and charging advance rental for various amendments to right-of-way A-051647 for a gas pipeline.

APC's dealings with BLM originated on April 20, 1960, when it filed right-of-way application A-051647 for a natural gas transmission line from a point on the Kenai Peninsula to the city of Anchorage pursuant to section 28 of the Mineral Leasing Act of February 25, 1920, 43 U.S.C. § 185 (1970). By 1961, BLM had granted APC approximately 62 miles of right-of-way. Military "outgrants" were issued by the

Department of the Army, Corps of Engineers (Army), for those portions of the pipeline which traversed the lands withdrawn by PLO No. 5, of June 26, 1942, pursuant to the Act of June 25, 1910 (Pickett Act), as amended, 43 U.S.C. §§ 141-42 (1970) (repealed by the Federal Land Policy and Management Act of October 21, 1976, P.L. 94-579, 90 Stat. 2792). This decision concerns a right-of-way for 3 miles of pipeline traversing land in secs. 34, 35, and 36, T. 13 N., R. 2 W., Seward meridian, which was included in that withdrawal and is known as the Campbell tract.

This particular stretch of land was involved in a contract (DAFA 03 67 C 0084) dated August 4, 1967, between the Army and APC, in which APC agreed to provide natural gas service to Ft. Richardson and Elmendorf Air Force Base, Alaska. The contract provides that it shall continue in effect for 10 years from the date service is commenced and shall continue thereafter until terminated at the option of either party. In this contract, the Army granted to APC, free of any rental or similar charge, a revocable permit to enter the service location for any proper purposes under the contract including the use of the site or sites agreed upon by the parties for the installation, operation, and maintenance of the facilities of the contractor required to be located upon Government premises. Pursuant to this contract, APC constructed a pipeline through the tract of land in question.

In the process of constructing the pipeline, APC requested additional easements and a construction permit from the Army. On January 20, 1971, the Army informed APC that it had filed with BLM a notice of relinquishment of the withdrawal for the land in issue. The Army advised APC that since the land had been declared excess to the Army, that the Army was without authority to issue easements and construction permits. It requested that APC's applications be filed with BLM. On February 9, 1972, APC filed an application with BLM for approval of the already existing natural gas pipeline as it traversed the military outgrants and is included in the contract issued by the Corps of Engineers. This application was designated AA-7002.

On April 13, 1972, an application for the construction of a pressure regulating station and two short pipelines leading from the regulator station to the main gas line was filed with BLM. The application was designated as AA-7586 but was subsequently combined with AA-7002 by decision of May 26, 1972.

On December 17, 1976, APC filed an amendment to its application for an additional 2-inch steel high-pressure line 177 feet long. Since all amendments are part of the same natural gas pipeline system, case file AA-7002 was combined with file A-051647.

The State Office issued its decision on February 15, 1977, requiring payment for reimbursement of costs and advance rental. ^{1/} The following excerpt from the decision explains how the State Office computed the

In accordance with 43 CFR 2802.1-7, the advance rental which must be paid prior to issuance of a grant for the remainder of this right-of-way is estimated at \$70,172, and is computed as follows:

a) Three miles of pipeline traversing sections 34, 35 and 36 of T. 13 N., R. 3 W., Seward Meridian, and the pressure regulating station in the NW 1/4 NW 1/4 of section 35, above township and range (per annum) . . . \$10,022

February 1, 1971 (date of relinquishment by the military) through January 31, 1978

($\$10,022 \times 7$) \$70,154

b) 2-inch pipeline 177 long by 10 wide in the NE 1/4 NE 1/4 of section 36, T. 13 N., R. 3 W., Seward Meridian.

(Per annum)	\$ 18	\$ 18
Total(a)	\$10,040	(per \$70,172 annum)

Rental in the amount of \$10,040 will subsequently be billed annually for the period beginning February 1, 1978 until December 31, 1980 (the date the rental for the remainder of the pipeline from the Kenai Peninsula to Anchorage falls due). If there are changes in the annual rental by virtue of an on-the-ground appraisal, your company will be notified as required by 43 CFR 2802.1-7(e) before the anniversary date of December 31, 1980.

In addition to the advance rental, the decision stated that 43 CFR 2802.1-2(a)(3) required applicants to submit a nonreturnable payment at the time of filing such application, including amendments. Accordingly, the State Office required APC to submit \$50 for

^{1/} The decision also rejected, in part, the right-of-way application filed February 9, 1972, because the portion of the pipeline which traverses the S 1/2 of sec. 10, T. 12 N., R. 3 W., Seward meridian, was patented to the State of Alaska in 1966 and is no longer under BLM's jurisdiction.

the amendment filed on December 17, 1976. The State Office advised APC that action on its application was being withheld for 30 days from the receipt of the decision to allow time for it to submit the advance rental and filing fee.

The State Office explained that the grant of July 12, 1960, would be amended to include those portions of the right-of-way requested by appellant plus the military outgrants listed below, when the required payments were received. The decision stated that rental charges would not be assessed as to three outgrants, which are not part of this appeal, until the expiration dates indicated, since the total appraised value was collected by the Corps of Engineers prior to issuance. The three outgrants are:

- (a) DA 95-507-eng-1523 which expires January 30, 2011.
- (b) DA 95-507-eng-2217 which expires July 7, 2015.
- (c) DA CA 85-2-70-15 which expires October 29, 1994.

In its statement of reasons for appeal, APC contends that the State Office decision is in error for a number of reasons. Appellant alleges that BLM has no jurisdiction over the tract of land through which the pipeline runs as it has never accepted responsibility for the lands subsequent to the withdrawal of 1942. Appellant explains that this land was withdrawn and reserved by PLO No. 5 for the use of the Defense Department for military purposes pursuant to the powers of the President under the Pickett Act, supra. This act specifies that such withdrawals and reservations shall remain in force until revoked by the President or by an Act of Congress. Appellant stresses that there has been no such revocation. Also, appellant states that no public land order has been published in the Federal Register which is a necessary prerequisite before a relinquishment of withdrawn lands becomes effective. Appellant contends that there is no evidence showing that BLM has accepted accountability and responsibility for the property pursuant to 43 CFR 2374.2 which provides that agencies will not be discharged of their accountability for land until the agency has resolved, through a final grant or denial, all commitments to third

parties relative to the rights and privileges in the land. Appellant notes that at the time the Army filed its intention to relinquish the lands, appellant had a right to use the sites provided by contract and had also filed for an easement for a pipeline which had already been built. The Department of Army did not resolve the application but advised appellant to file an application with BLM. Appellant contends that this was erroneous as the Army, rather than BLM, had jurisdiction over the land.

Appellant's second argument is that even assuming arguendo that BLM has authority over the tract of land in question, APC has a valid right-of-way by contract for which BLM may not assess rent. Appellant bases this argument on paragraph 4(b) of the service contract:

"4(b). The Government hereby grants to the contractor, free of any rental or similar charge, but subject to the limitations specified in this contract, a revocable permit to enter the service location for any proper purpose under this contract including use of the site or sites agreed upon by the parties hereto for the installation, operation, and maintenance of the facilities of the Contractor required to be located upon Government premises . . ."

Citing Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), appellant claims that the terms of the contract grant it a revocable permit for the use of Governmental premises which is legally equivalent to a right-of-way. Appellant claims that it is probable that it has an easement by estoppel or an easement by necessity since it has relied upon the contract and spent large sums of money in meeting its terms. Appellant emphasizes that the contract itself is sufficient to grant appellant a legally effective rental-free right-of-way, and contends that the Army has never revoked the permit. Appellant cites 43 CFR 2802.3-2 which provides that a change in jurisdiction over the lands from one agency to another will not cancel a right-of-way involving such land. Therefore, appellant reasons, even if jurisdiction over the land did pass to BLM, the right-of-way is not cancelled. Appellant reinforces its position that the right-of-way was not canceled even if BLM did assume jurisdiction by citing 43 CFR 2802.3-1 which provides that no right-of-way shall be cancelled except on issuance of a specific order of cancellation.

Appellant's next point is that BLM has no authority to assess the rental charge made in the decision of February 15, 1977. Appellant claims that BLM is precluded from assessing a rental fee because the utilities service contract grants appellant, free from any rental or similar charge, a revocable permit to enter the service location for any purpose under the contract including use of the site agreed on by the parties for the installation, operation, and maintenance of the facilities of the contractor required to be located upon Government premises. Appellant contends that BLM could ratify the previously granted right-of-way (assuming it has jurisdiction over the land), but has no authority to unilaterally change the fee terms or rental fee of this right-of-way. Appellant cites 30 U.S.C. § 185(1) (1975 Supp.) to support this position.

Also, appellant focuses on the fact that it based its contractual bid price for the cost of providing natural gas service to the Government upon the provision of the contract which granted it free use of the sites upon which the service facilities were to be located. Appellant claims that an assessment of a rental charge at this point is prejudicial to it, as it did not incorporate into its contract price additional rental costs.

Finally, appellant alleges that 43 CFR 2802.1-7 and 30 U.S.C. § 185 (1976) give BLM authority only to assess advance rental charges. Therefore, appellant reasons, BLM had no authority to assess rent from February 1, 1971, through January 31, 1978. Also, appellant contends that the appraisal is in error.

In response, ^{2/} BLM submits that it has authority to issue a right-of-way permit for a gas pipeline crossing the Campbell tract. In support of this proposition, BLM states that a temporary withdrawal of the tract for the use of the Army did not result in the loss of the Department of the Interior's jurisdiction over the tract. BLM states that PLO No. 5 withdrew the land in question for "the use of the War Department for military purposes" and it construes this as a temporary withdrawal. The Pickett Act, supra, provided that the President could temporarily withdraw and reserve any public lands and such withdrawal would remain effective until revoked by him or an act of Congress. (The President's authority was delegated to the Secretary by Executive Order No. 10355, May 26, 1952, 17 FR 4831.) Therefore, BLM concludes that the Campbell tract was a temporary withdrawal. In light of this, BLM contends that 10 U.S.C. § 2669(a) (1976), the authority under which the Army may grant an easement for a right-of-way, specifies that such easements may be granted by the Secretary of the military department on "public lands permanently withdrawn * * * for use of that department, and other lands under his control, for gas, water, and sewer pipe lines * * *." Accordingly, BLM reasons that the Secretary of the Army had no authority to issue a right-of-way under 10 U.S.C. §§ 2668-69 (1976). On the other hand, BLM argues that the Secretary of the Interior has authority to issue a right-of-way permit under the Mineral Leasing Act, supra. BLM cites authority for the proposition that the Department of the Interior has discretion to grant a lease on withdrawn lands under the Mineral Leasing Act and lands in a withdrawal are included in the definition of "Federal lands" in the Mineral Leasing Act.

BLM also points to section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. § 185(c)(2) (1976), which discusses the coordination of a right-of-way application between two agencies which share jurisdiction over the same Federal lands. The act authorizes the Secretary of the Interior, after consulting with the other agencies, to grant a right-of-way permit. BLM submits that it had joint jurisdiction over the land with the Army and therefore had authority to grant the right-of-way.

^{2/} By Order dated April 27, 1977, this Board required both parties to the appeal to serve upon the contracting officer of the Army all past and future filings relating to this appeal. To date, the contracting officer has made no submissions to this Board relating to the instant appeal. The Board's decision on this appeal, therefore, is premised on the assumption that service under the supply contract has continued.

BLM contends that it did accept accountability and responsibility for the land in accordance with 43 CFR 2372, 2374. BLM says that PLO No. 5 has not been formally revoked, but notes that a withdrawal need not be revoked in order for BLM to assume jurisdiction. BLM contends that in order to assume jurisdiction it need only comply with 43 CFR 2374.2.

BLM submits that, assuming arguendo, the Board finds BLM does not have jurisdiction over the Campbell tract, the Board could decide that BLM may issue a right-of-way as an agent for the Army. BLM explains that when the Army filed its notice of intent to relinquish, the Army consented to BLM acting as its agent and managing the Campbell tract. Additionally, BLM suggests that the Army's notice to appellant to apply to BLM for a right-of-way created an agency by estoppel. BLM explains that an agency by estoppel arises when a principal makes manifestations to a third person resulting in a reasonable belief by that person that the alleged agent is authorized to bind the principal, and the third person relies on the manifestation of authority. BLM sees appellant's application for a right-of-way to BLM as reliance on the Army's manifestation that BLM had authority to act as its agent.

As for the contract, BLM contends that appellant's contract with the Army did not give it a right-of-way permit but merely authorized it to enter the power plants at Ft. Richardson and Elmendorf Air Force Base to perform maintenance work. BLM admits that Exhibit "C" to the contract sets forth transmission line routing, but adds that nowhere in the contract is a right-of-way for the pipeline expressly granted.

BLM makes reference to an agreement between appellant and the Army signed July 21, 1971. BLM claims that in this agreement, the parties agreed that the area covered under contract was not covered by an easement.

BLM takes the position that an easement by necessity cannot be implied against the Government. BLM cites authority for the proposition that a right to an easement over Federal land may only be obtained in accordance with specific statutory authority.

BLM alleges it has the right to charge rent for the right-of-way and is not barred by the contract from doing so. It reasons that since appellant had no right-of-way under the contract, charging for one would not change the terms of the contract.

BLM notes that 30 U.S.C. § 185(1) (1976) requires a right-of-way applicant to reimburse the United States for processing costs and requires a right-of-way holder to pay pipeline monitoring expenses and advance rental annually. BLM further claims that rental should be assessed against appellant for use and occupancy of Federal lands from appellant's original date of entry in 1968. In its decision BLM assessed rental from February 1, 1971, the date the Army filed its

notice of intent to relinquish the land. BLM moves that the decision be amended to assess rent from January 1, 1968, to January 31, 1978, and to increase the rental estimate from \$70,154 to \$100,200, causing the total assessment to be \$100,238.

Appellant filed a reply memorandum with the Board. In this document, appellant responds to BLM's argument that the Defense Department never had authority to grant an easement across a temporary withdrawal. Appellant points out that withdrawal of the Campbell tract was made under the President's inherent authority, thereby creating a permanent withdrawal. Appellant notes that PLO No. 5 makes no mention that the withdrawal was made pursuant to the Pickett Act. Appellant also points out that there is an inconsistency between BLM's assertion that the land was temporarily withdrawn and PLO No. 5. If the withdrawal were temporary, appellant explains, the land would be open to occupation and purchase under mining laws which would be repugnant to military uses for which it was withdrawn. According to appellant, it then follows that the withdrawal was permanent and that 10 U.S.C. §§ 2668-69 (1976) is authority for granting an easement for a right-of-way because these sections apply to permanent withdrawals.

Appellant also submits that even if the withdrawal were temporary, 10 U.S.C. §§ 2668-69 (1976) would be applicable. 10 U.S.C. § 2669(a) (1976) encompasses public lands permanently withdrawn or "reserved for the use of that department, and other lands under his [the Secretary of the military department] control." Appellant notes that section 2668 is essentially identical. Appellant refers to the Army's interpretation of 10 U.S.C. § 2669 in 32 CFR 552.60 which states that the Secretary of the Army is authorized to grant easements for rights-of-way for gas, water, and sewer pipelines across lands under his control. Appellant further claims that resorting to 10 U.S.C. §§ 2668 and 2669 (1976) may not be necessary because these sections grant authority to the Secretary to grant easements for rights-of-way, not in cases where a military need is served, but where it is in the public interest. PLO No. 5, appellant argues, withdrew the land and reserved it for military purposes only. Appellant concludes that where a military purpose is served, as in this case, the Army's authority to grant easements for rights-of-way is derived from the President's inherent authority as limited only by PLO No. 5.

Appellant emphasizes again that if the land is permanently withdrawn, BLM is divested of jurisdiction. Appellant argues that BLM's contention that it has jurisdiction under the Mineral Leasing Act, *supra*, to issue easements for rights-of-way over the Campbell tract is in error because: (1) PLO No. 5 specifically precludes the operation of the Mineral Leasing Act, and (2) the withdrawal effected a change of status of the land, taking it outside the domain of "public lands" encompassed by 30 U.S.C. § 185 (1976). Appellant reiterates that the Army's notice of intent to relinquish the Campbell tract did not automatically vest jurisdiction in BLM.

Appellant further argues that Paragraph 4(b) of the contract granted it a rental free right-of-way. Appellant states that the Army's Contracting Officer by letter of February 15, 1968, specifically granted a right-of-way to appellant with regard to this project, indicating that the formalities of an easement agreement would be provided at a later date.

Appellant stresses that the term "service location" as used in the contract means the location of the pipeline over the area which it traverses. Therefore, appellant asserts, the contract itself grants the right-of-way for the entire pipeline project.

Appellant again discusses the theory that the Government is estopped to contest the validity of the rental-free right-of-way. Appellant asserts that the officers and agents of the United States can bind the Government when they are acting within the scope of their authority and empowered in their official capacity to make such declarations. Appellant submits that the undisputed evidence in this case shows that the Contracting Officer was lawfully authorized to enter into the contract on behalf of the Government.

As for the appraisal, appellant cites a memorandum issued by an Acting Deputy Solicitor of the Department of the Interior which states that re-appraisals of rentals should only be assessed prospectively and not retroactively, noting a disagreement with both Utah Oil Refining Company, 57 I.D. 79 (1939), and Western Arizona CATV, 15 IBLA 259 (1974), cases cited by BLM.

Finally, appellant objects to BLM's motion to amend its decision to assess rentals retroactive to 1968 rather than 1971, and demands its rights and remedies before the local BLM office, including a decision by a person authorized to make such a decision.

[1] At the outset, we must determine if the Army did, in fact, have jurisdiction over the land and, if so, whether it had authority to issue the right-of-way in question. On June 26, 1942, the Campbell Tract was withdrawn pursuant to PLO No. 5 which states in pertinent part:

"By virtue of the authority vested in the President and pursuant to Executive Order No. 9146 of April 24, 1942, IT IS ORDERED AS FOLLOWS:

The following described lands are hereby withdrawn, subject to valid existing rights, from all forms of appropriation under the Public Land Laws, including the Mining Laws, in reserve for the use of the War Department for military purposes:" [Executive Order No. 9146 refers to both the President's inherent and his statutory Pickett Act authority.]

The Pickett Act, supra, also granted authority to the President to withdraw land for military purposes. The Act stated:

The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

BLM argues that since the land was withdrawn pursuant to the Pickett Act, supra, the withdrawal must necessarily be a temporary one. An isolated reading of this statute may give strength to BLM's proposition, but when read in conjunction with PLO No. 5, this interpretation is faulty. A study of this order discloses that it was issued pursuant to the inherent power of the President.

The President's authority to withdraw or reserve portions of the public land was not impaired or affected by the passage of the Pickett Act. United States v. Midwest Oil Co., 236 U.S. 459 (1915); P. & G. Mining Company, 67 I.D. 217, 218 (1962). In a 1941 opinion, the Attorney General discussed the impact of the Pickett Act on the Presidential power to withdraw land in relation to the mining laws:

When lands are withdrawn temporarily for a purpose coming within the 1910 Act, those lands are subject to the terms of that act and accordingly said mining laws apply. If, however, the lands are not withdrawn temporarily for a purpose within the 1910 Act, but for permanent use by the Government for other and authorized uses, the mining laws made applicable to lands withdrawn under the 1910 Act do not apply.

(40 Ops. Att. Gen. 73, 81).

He added:

There should be considered also the practical results of an interpretation that the act of 1910 was intended to be all-inclusive. Such interpretation would mean that land withdrawn by the President since 1910 for military or naval reservations would in many instances be open to exploration, discovery, occupation and purchase under the mining laws. This would be true also of land withdrawn for other essential

Federal uses. In the absence of compelling considerations it may not be assumed that the Congress intended this result.

(Id. 83). P. & G. Mining Company, *supra* at 219. A temporary withdrawal under the Pickett Act permitted operation of the mining laws. If the Campbell tract had been temporarily withdrawn, it would have been subject to the mining laws. This would conflict with the "military purposes" for which the land was withdrawn. Also, a temporary withdrawal which permits operation of the mining laws would be inconsistent with PLO No. 5 which prohibits operation of the mining laws.

PLO No. 5 was issued pursuant to the inherent powers of the President and specifically indicates that the lands are withdrawn from the operation of the mining laws. In P. & G. Mining Company, *supra* at 219-20, the Department held this to be indicative of a permanent, rather than a temporary withdrawal, notwithstanding that the order therein was issued pursuant to the Pickett Act. The opinion reads:

In this instance, the withdrawal was made in the exercise of the President's inherent power, as evidenced by the fact that a permanent refuge was established, although the authority conferred by the statute [the Pickett Act] is also cited. This seems to be a fairly common practice for a number of years. It is significant that in some instances where both the President's inherent authority and the statutory authority are relied upon there is a specific provision that mining activities shall not be prohibited. This indicates clearly that a full exercise of Presidential authority was intended in every instance wherein such language was not included in the withdrawal order.

The Pickett Act, then, which authorized temporary withdrawals, did not limit the President's authority to withdraw or reserve land. Since the President had general or inherent authority to withdraw public land as well as authority conferred upon him by the Pickett Act, there is no basis for assuming that this Act was the source of his authority in every instance. Denver R. Williams, 67 I.D. 315, 316 (1960); Sally Lester (On Reconsideration), 35 IBLA 61 (1978). ^{3/}

^{3/} While section 704(a) of FLPMA expressly repealed both the implied authority of the President to withdraw lands, resulting from the acquiescence of the Congress, as well as the Pickett Act, it had no effect on the validity of the existing withdrawals, particularly in the State of Alaska. See 43 U.S.C. § 1714(e)(1) (1976).

[2] The applicable statutes, 10 U.S.C. §§ 2668 and 2669 (1976), allowed the Army to issue easements for rights-of-way. ^{4/} 10 U.S.C. § 2669 (1976) provides in pertinent part:

(a) If the Secretary of the military department finds that it will be in the public interest * * *, he may grant, upon such terms as he considers advisable, easements for rights-of-way over, in, and upon public lands permanently withdrawn or reserved for the use of that department, and other lands under his control, for gas, * * * lines, * * *.

(Section 2668 is essentially the same.)

The language of 10 U.S.C. § 2669 (1976) is all-inclusive. The section specifically authorizes easements for rights-of-way over permanently withdrawn lands and also provides that the Secretary of a military department may issue such easements on "other lands under his control." We find that the land withdrawn by PLO No. 5 comes within the ambit of the quoted language. Therefore, this section gives the Army the authority to issue an easement or permit for a right-of-way over that land, whether the withdrawal be permanent or temporary.

Having determined that the Army had authority to issue an easement or permit for a right-of-way, we shall next consider whether the service contract between appellant and the Army actually provided for a right-of-way.

Paragraph 4(b) of the contract provides in pertinent part as follows:

The Government hereby grants to the contractor, free of any rental or similar charge, . . . a revocable

^{4/} To the extent to which these provisions controlled the issuance of easements for pipeline rights-of-way, they were superseded by the provisions of section 101 of the Trans-Alaska Pipeline Authorization Act of 1973, 87 Stat. 576, amending section 28 of the Mineral Leasing Act 30 U.S.C. § 185 (1976). While the text thus refers to the statute in the present tense, since it is still effective as regards easements for other types of rights-of-way, it should be understood that the provisions are no longer effective as they relate to oil and gas pipelines.

Moreover, while the authority granted by 10 U.S.C. § 2669 is, by its terms limited to the grant of "an easement," we believe that it clearly contemplates, as well the grants of rights which might be deemed to be of less expanse than that normally associated with easements.

permit [5/] to enter the service location for any proper purpose under this contract, including the use of the site or sites agreed upon by the parties hereto for the installation, operation, and maintenance of the facilities of the Contractor required to be located upon Government premises * * *.

BLM claims that the language of this paragraph merely authorizes appellant to enter the power plants at Fort Richardson and Elmendorf Air Force Base to perform maintenance work. Appellant interprets it as granting a revocable permit for a right-of-way for the pipeline.

[3] In the construction or interpretation of contracts, the primary purpose and guideline, and indeed the very foundation of all rules for such construction or interpretation, is the intention of the parties. 17 Am. Jur. 2d Contracts § 244 (1964); 4 WILLISTON, CONTRACTS 3d ed. § 601 et seq. (1961).

In City of Harlan, Iowa v. Duncan Parking Meter Corp., 231 F.2d 840, 841-42 (8th Cir. 1956), the court enunciated this principle:

The primary rule for the construction of contracts is that the court must if possible ascertain and give effect to the mutual intention of the parties. A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument. Individual words and phrases must be considered in connection with the rest of the contract. [Citations omitted.]

Accord, Tomco, Inc., 29 IBLA 298, 301 (1977).

The parties to this contract, appellant and the Army, clearly intended it to be an agreement by which appellant would supply gas to the designated areas. The words "service location" must be construed not in an isolated sense but in relation to the entire contract. The only reasonable construction in light of the purpose of the contract would be to include the location of a pipeline right-of-way within their ambit. This construction would be entirely consistent with the situation of the parties to the contract at the time that it was executed. BLM's contention that the Army's letter of July 21, 1971, stated that an easement had not been granted is nonpersuasive in light of the fact that APC does not contend that it was granted an "easement," but merely that it was granted a revocable permit.

^{5/} Appellant cites authority in its statement of reasons to show that a revocable permit is as much of a "right-of-way" as an easement. See e.g., Wilderness Society v. Morton, supra at 853-54. BLM has not contravened this contention.

Between the contracting parties, the language of the contract was clear and unambiguous. Neither party had any difficulty interpreting the contract. It is only in the present controversy between BLM and appellant that an apparent ambiguity exists.

[4] In construing an ambiguous contract, the conduct of the parties in relation to such contract is to be considered in determining its meaning and is persuasive evidence of the actual, practical construction which the parties have placed upon the contract and its meaning. Continental Assur. Co. v. Conroy, 209 F.2d 539, 542-543 (3d Cir. 1954). This principle is set forth in RESTATEMENT OF THE LAW, CONTRACTS § 235 (1932), which states: "Rules Aiding Application of Standards of Interpretation * * *": (e) If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation."

Here, appellant began construction of the pipeline pursuant to the contract. There is no indication that the Army objected to this construction. On the contrary, we can reasonably assume that the Army intended to give appellant a permit for the pipeline in order that appellant be able to perform its obligations under the contract. It defies logic to think that appellant was to provide gas for Ft. Richardson and Elmendorf Air Force Base but that the Army, the Department having jurisdiction over the land, would not give appellant a permit to construct the pipeline.

BLM cites Sun Studs, Inc., 27 IBLA 278, 83 I.D. 518 (1976), for the proposition that there can be no common law easement of necessity across the public land when the United States is the grantor. In that case the Board noted that the fact that Congress has enacted statutes for specific types of rights-of-way weighs against finding an easement by implication. In appellant's case, 10 U.S.C. §§ 2668 and 2669 (1976) provided authority to grant the specific type of right-of-way permit in question. The doctrines of implied right-of-way or common law easement by necessity are not applicable.

[5] Turning to the question of whether or not BLM assumed jurisdiction over the Campbell tract, we note that the applicable regulation, 43 CFR 2372.3(a), provides:

When the authorized officer of the Bureau of Land Management determines the holding agency has complied with the regulations of this part, including the conditions specified in § 2374.2 of this subpart, and that the lands or interests in lands are suitable for return to the public domain for disposition under the general public land laws, he will notify the holding agency that the Department of the Interior accepts accountability and responsibility for the property, sending a

copy of this notice to the appropriate regional office of the General Services Administration.

We note that by letter of November 4, 1971, the Acting Chief Adjudicator, Bureau of Land Management, advised the Chief, Real Estate Division of the Army Corps of Engineers, that "we hereby accept accountability and responsibility for the entire area described in your notice of intention to relinquish lands, dated January 20, 1971." Thus, under the applicable regulation, BLM clearly assumed jurisdiction over the lands.

Appellant, however, contends first, that under Executive Order (E.O.) 10355, 17 FR 4831, a Public Land Order is required to revoke a withdrawal, and second, that BLM failed to follow the regulations controlling relinquishments of withdrawals.

We note initially that E.O. 10355, which was effectively revoked by section 704(a) of FLPMA, 90 Stat. 2792, provides, in relevant part, that the Secretary of the Interior is delegated the full withdrawal authority of the President emanating from both the Pickett Act and the President's inherent authority: "including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." It further provides that: "All orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted * * * for publication in the Federal Register." Nothing in this Executive Order, however, impels the conclusion that the relinquishment of jurisdiction over land withdrawn constituted a revocation of the withdrawal. In point of fact, it did not. The withdrawal, itself, remained in effect unless it was revoked in accordance with the procedures outlined in E.O. 10355. It continues to remain in effect until it is revoked by the procedures established by FLPMA. Both the BLM Manual provisions in effect in 1971 and the actual letter of November 4, 1971, make this clear. 6/

6/ APC has cited the present BLM Manual provision found at 2373.15 in support of its view that accountability and revocation of the withdrawal are interdependent. Nothing in the terms of the Manual provision supports this view, though Illustration 4, which is referred to in the provision, arguably implies that accountability is assumed simultaneously with the publication of a PLO revoking the withdrawal. Illustration 4, however, is simply that - an illustration. In some cases BLM may wish to defer acceptance of accountability until the actual revocation of the withdrawal. But we find no indication anywhere in the Manual that publication of the PLO is a prerequisite to the acceptance of accountability.

In any event, as shown in the text, the Manual provision which was in effect at the relevant times herein clearly presupposes acceptance of accountability prior to the issuance of a PLO revoking a withdrawal.

The Manual provision then in effect provided that "where the Bureau accepts accountability and responsibility for the lands, an order of revocation shall not be issued prior to 60 days after the notice is sent in order to allow the General Services Administration, if it deems necessary, to request reconsideration of determination." BLM Manual Release No. 166, May 5, 1959, Vol. V at 4.22.18. In the letter of November 4, the Acting Chief Adjudicator specifically noted: "Any future land order partially revoking PLO No. 5, as amended, will of course appear in the Federal Register."

The entire process of accepting jurisdiction is a necessary prerequisite for the revocation of the withdrawal under the provisions of the Federal Property and Administrative Services Act of 1949, 63 Stat. 378, 40 U.S.C. § 471 et seq. (1970). This Act, by its terms, is not applicable to the public domain, but under the procedures of the General Services Administration, whenever it is deemed that the land which has been under the administration of another agency has been so substantially changed in character that the lands are not suitable for management or disposition under the public land laws, they would be classified as "property" within the meaning of the Act. Disposition of such "property" would be under the jurisdiction of the GSA. In the instant case, had it been determined by BLM that the land was so substantially changed as to render it unfit for public land management, upon GSA concurrence in that determination, the land office records would have been noted that the lands were subject to disposal as property, and further action would have been taken to revoke the withdrawal. See BLM Manual 2372.16. However, inasmuch as BLM determined that the land had not been so substantially changed, it accepted jurisdiction; but it did not, by that act, effectuate the revocation of the withdrawal of the lands. Revocation requires subsequent action by the Department. Thus, the provisions of E.O. 10355 were not violated.

Appellant also contends that BLM violated the regulations relating to acceptance of relinquishments, in that the provisions of 43 CFR 2374.2(d) provide that agencies will not be discharged of their accountability unless and until: "the holding agency had resolved, through a final grant or denial all commitments to third parties relative to rights and privileges in and to the lands or interest therein." Appellant contends that inasmuch as it had, at the time of BLM's acceptance of jurisdiction, a pending application for an easement for the pipeline which had already been constructed, which application had not been resolved, BLM's acceptance of the jurisdiction violated the regulation.

This argument is somewhat inconsistent with appellant's contention that its use of the land was under a revocable permit grounded in the contract entered into with the Army. In this regard we need only refer to appellant's repeated assertion on appeal that "Alaska Pipeline has never claimed that it has 'an easement' but only a

revocable permit granted by the contract which is equivalent to a right-of-way." Reply Memorandum, at 19; see also Statement of Reasons in Support of Appeal, at 7.

In any case, the January 20, 1971, letter from the Army to APC clearly stated that since the Army had filed a notice of relinquishment of the withdrawal, embracing the lands in issue, it was without authority to issue the requested easements. This was a final rejection of their application. We accordingly hold that effective November 4, 1971, BLM assumed jurisdiction over the lands in the Campbell tract.

[6] The next question is whether, having determined that BLM properly accepted jurisdiction over the Campbell tract, BLM has the authority to revoke the permit. If the answer to this question is in the affirmative, a subsidiary question arises as to whether BLM has so acted to revoke the permit.

It must be kept in mind that the revocable permit of which APC is possessed herein, flows from contractual provisions and not from mere quiet acquiescence on the part of the Army. Moreover, there is nothing in the record to indicate that the Army formally revoked the permit or intended that the transfer of jurisdiction over the Campbell tract would serve to revoke the permit. Thus, the simple fact of the transfer of jurisdiction does not, ipso facto, empower BLM to revoke the permit. Reference must be made to the provisions of 43 CFR 2374.2(e) which provides that acceptance of accountability and responsibility will not occur until: "the holding agency has submitted to the appropriate office * * * a copy of, or the case file on, easements, leases, or other encumbrances with which the holding agency or its predecessors have burdened the lands or interests therein." (Emphasis supplied.)

Clearly, had the Army issued a formal easement to appellant, it would not be argued that BLM could unilaterally rescind the grant. The permit herein, however, is revocable. But by whom and under what circumstances? To the extent to which the permit is based in the contract between Army and APC, revocation of the permit must be controlled by the contractual provisions. Section 4(b) of the contract provides that the facilities of the contractor "shall be removed and Government premises restored to their original condition by the Contractor at its expense within a reasonable time after the Government shall revoke the permit herein granted and in any event within a reasonable time after termination of this contract."

Two factors should be noted. First, the above-quoted section of the contract provides that the permit can be revoked during the life of the contract. This interpretation inevitably flows from the second part of the quoted section relating to the termination of the contract. If contract termination were the only circumstance which could revoke the permit, there would be no need for the statement "and in any event within a reasonable time after termination of this contract."

Second, the contract, by its terms, refers to the "Government" and not to any specific subdivision thereof. While it is clear that the acceptance of the Campbell tract by BLM did not serve to effectuate a simple substitution of BLM in the place of the Army within the contractual terms, it did bring into play the provisions of 43 CFR 2802.3-2, which provide: "A change of jurisdiction over the lands from one Federal agency to another will not cancel a right-of-way involving such lands. It will, however, change the administrative jurisdiction over the right-of-way." ^{7/} Under the plain language of the regulation, BLM became the administering agency upon its acceptance of administrative accountability and responsibility.

This change, however, does not adversely affect appellant. BLM must still administer the grant of the revocable permit within the confines of that grant. While it is true that BLM may, under the terms of the contract, unilaterally revoke the permit, BLM would only be exercising the same authority which the Army formerly had. Moreover, section 5 of the contract specifically provides that at the request of either party the rates may be renegotiated where there is reasonable cause, with the only proviso that "any rates so negotiated shall not be in excess of rates to any customer of the contractor having similar conditions of service." (Emphasis supplied.) Thus, should BLM revoke the rental-free permit, APC is completely at liberty to attempt to invoke the provisions of section 5 and seek a renegotiation of the contractual rates.

We also find, however, that BLM has never exercised its right to cancel the revocable permit. The applicable regulation, 43 CFR 2802.3-1, states that "no right-of-way shall be deemed to be canceled except on the issuance of a specific order of cancellation." No such order having been issued, the permit cannot be deemed to have been revoked. Moreover, even without this provision it seems self-evident that revocation of the permit could only be effective upon communication of the action to the appellant. This was not done here. Thus, BLM's decision requiring past rental payments as a prerequisite to the granting of APC's amendments to A-051647 must be reversed.

[7] The final question relates to the present status of appellant's various amendments to its existing right-of-way, A-051647. We have noted, supra, that inasmuch as BLM failed to formally revoke the permit, it was improper for BLM to charge rental for past usage. To date, since BLM has not so revoked the permit, no rental charge is

^{7/} The definition of a right-of-way for the purposes of this part of the regulations is found at 43 CFR 2800.0-5(i): "Right-of-way' includes license, permit, or easement, as the case may be, and, where applicable, includes 'site'." (Emphasis supplied.) The general regulations in Part 2800 are applicable to Subparts 2881 and 2882—the regulations issued pursuant to 30 U.S.C. § 185 (1976). 43 CFR 2800.0-1(a).

owing. However, to the extent to which APC seeks approval of various amendments to right-of-way A-051647, such amendments may only be granted under the provisions of the Trans-Alaska Pipeline Authorization Act, supra. Appellant has conceded that it did not receive an easement under its contract with the Army, but only a revocable permit. As such, it is clearly subject to possible future revocation. APC has apparently decided to more firmly ground its continued right to utilize the land by seeking a right-of-way grant from BLM. We note that the provisions of section 28(q) of the Mineral Leasing Act, as amended, 30 U.S.C. § 185(q) (1976), provide that "any application of a right-of-way filed under other law prior to the effective date of this provision may, at the applicant's option, be considered as an application under this section." This provision, however, does not infer that the applicant has the option of proceeding under such former law as existed. On the contrary, the preceding sentence states that "no rights-of-way for the purposes provided for in this section shall be granted or renewed across Federal lands except under and subject to the provisions, limitations, and conditions of this section." All this section provides is that applicants are free to elect to have their applications considered under the new procedures; if they elect not to so proceed, their applications will be rejected.

Moreover, nothing in section 28(t) of the Mineral Leasing Act, as amended, 30 U.S.C. § 185(t) (1976) compels a different result. That section merely provides that the Secretary of the Interior may ratify and confirm "any * * * permit for an oil and gas lease pipeline or related facility that was granted under any provision of law before the effective date of this subsection, if it is modified by mutual agreement to comply to the extent practical with the provisions of this section." Inasmuch as the permit herein is clearly revocable, the Secretary or his authorized delegate, BLM, may unilaterally decide to revoke the permit, even within the confines of 30 U.S.C. § 185(t), or both parties may by mutual agreement conform its provisions to comport with existing law.

It is, therefore, our view that the applications for amendment of right-of-way A-051647 are presently pending before the Department, and that if they are to be granted they may only be authorized in conformity with the provisions of the Trans-Alaska Pipeline Authorization Act, supra, which requires both the reimbursement of costs for processing the application incurred in monitoring the construction, operation, maintenance, and termination of any pipeline and related facilities, and the payment, in advance, of annual rentals. See 30 U.S.C. § 185(1) (1976).

In conclusion, we find that PLO No. 5 gave the Army jurisdiction over the Campbell tract and that the applicable statute, 10 U.S.C. §§ 2668-69 (1976), granted the Army authority to issue an easement for a right-of-way across the tract. This holds true whether the withdrawal under PLO No. 5 is deemed permanent or temporary. We find that

Contract No. DAFA 03 67 C 0084 signed by the Army and appellant provided appellant with a rental-free right-of-way, subject to the election by the Department of the Army of its right to terminate service, or affirmative action by BLM to revoke the permit, which action, however, has not yet occurred. The revocable permit remains in effect. Therefore, it is unnecessary to decide whether the appraisal used by BLM in arriving at its past rental charge was in error. As for reimbursement of costs relating to the filing fee, appellant is required to compensate the Government for the costs incurred in processing its application in accordance with 43 CFR 2802.1-2(a)(3), as explicated in Public Service Co. of Colorado v. Andrus, 433 F. Supp. 144 (D. Colo. 1977), appeal pending.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to reimbursement of costs relating to the filing fee, and reversed as to the payment of rental for the right-of-way.

James L. Burski
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Edward W. Stuebing
Administrative Judge

